

## **329 IAC SOLID WASTE MANAGEMENT BOARD**

**#05-297(SWMB)**

### **SUMMARY/RESPONSE TO COMMENTS FROM THE FIRST HEARING ON JULY 18, 2006**

No comments were received at the hearing.

### **SUMMARY/RESPONSE TO COMMENTS FROM THE RECONVENED FIRST HEARING ON SEPTEMBER 19, 2006**

IDEM received comments from the following parties:

Environmental Health Management Systems, Inc. (EHMS)  
NSWMA IN Chapter (NSWMAINC)  
Lake County Solid Waste Management District (LCSWMD)  
(Includes Mayor Rudolph Clay (MRC), City of Gary (COG))

Following is a summary of the comments received and IDEM's responses thereto.

*Comment:* "On behalf of PEAT International, Inc., I am submitting comments pertaining to the "Amendments to Rules Concerning Solid Waste Processing Facilities at 329 IAC 11". My comments specifically address the definition of "Plasma arc treatment" Sec. 28.4 as presented in your Indiana Register notice dated May 1,2006. As a brief introduction, PEAT International, Inc. is a waste-to-resources company specializing in a proprietary "Plasma Thermal Destruction Recovery" technology for the treatment of hazardous, industrial and special wastes. Currently PEAT International, Inc. is undergoing the initial phases of property acquisition, zoning approval, and solid waste siting approval for a facility to be located in Indianapolis. This facility will be the first commercial plasma waste destruction facility in the United States and is scheduled to open during the fourth quarter of 2007.

The current definition of "plasma arc treatment" as defined in the May 1,2006 Indiana Register is the following:

"Plasma arc treatment" means the process of:

- (1) putting waste into an enclosed chamber; and
- (2) introducing a high energy electrical arc that:

(A) produces intense heat;

(B) breaks down the organic molecules of the waste into their elemental atoms. "

I am suggesting two modifications be made to this definition. The first revision is to incorporate a statement that defines plasma arc treatment as a process that treats waste through noncombustion. Although plasma arc treatment is traditionally defined as a non-combustion process, plasma torches

can and have been used to ignite waste, essentially converting the destruction process to a combustion process (i.e., incineration). To ensure that "plasma arc treatment" meets the intended function as envisioned by the Board, it is recommended that a statement be added defining the process as a non-combustion method. An example of such language is provided below.”(EHMS)

*Response:* Since the definition for a solid waste processing facility clearly includes both a solid waste incinerator and a facility that uses plasma arc or another source of heat to treat solid waste as a separate type of processing facility, IDEM does not see the necessity of revising the definition of the plasma arc treatment as suggested by the commenter.

*Comment:* “A second definitional revision is necessary to reflect the capability of plasma arc treatment to render both organic and inorganic molecules to their respective elements, not just organic molecules. Inorganic molecules are defined as having no carbon constituents. They are equally sensitive to destruction to their elemental state as organic molecules in the plasma arc treatment process. Simply deleting "organic" from the definition would suffice to be inclusive of all molecules, both organic and inorganic.

As such, the following modified definition is offered to the Board:

Sec. 28.4 "Plasma arc treatment" means the process of:

- (1) putting waste into an enclosed chamber; ~~and~~
  - (2) **treating waste through non-combustion method; and**
  - (3) introducing a high energy electrical arc that:
    - (A) produces intense heat;
    - (B) breaks down ~~the organic~~ molecules of the waste into their elemental atoms.”
- (EHMS)

*Response:* IDEM agrees with the commenter on the need for the inclusion of all molecules, both organic and inorganic to the definition of “plasma arc furnace”, and has therefore deleted “organic” from the definition.

*Comment:* “1. 329 IAC 11-3-1(5) - Exclusion for facilities processing recyclables

- a. To clarify that the 3 listed criteria are used to determine that a facility meets this definition, we suggest amending the preceding sentence as follows: "To **qualify**, ~~The~~ the facility must ~~do the following:~~"
- b. The word "substantial" is used in Subsection (A) and is not defined. What does substantial mean? For example, does it prohibit the use of any machinery or equipment for sorting?
- c. In Subsection (B) would appear to prohibit the shipment of processed materials to a secondary processor prior to shipment for reuse in remanufacturing. This would potentially discourage certain recyclable materials from being segregated to be recycled.” (NSWMAINC)

*Response:* IDEM revised the language cited to address the concerns mentioned.

*Comment:* “2. 329 IAC 11-13-3(b)(1)(B)(i) - Reference to times employee present at facility.

- a. Not sure why this is necessary. If the intent is to require that an employee is present when the public uses the facility, then posting the times that an employee is present and that the facility is open to the public is redundant. Posting the times that an employee is present after the public hours of operation seems to serve no purpose. We feel that posting the hours when an employee is present in addition to the hours that the facility is open to the public serves no environmental or public information purposes and should be deleted from the proposed rule.”  
(NSWMAINC)

*Response:* IDEM concurs that the requirement for posting the times that a facility employee is present at the facility while requiring posting of the hours the facility is open to accept waste is redundant. Therefore, IDEM has deleted the requirement at 329 IAC 11-13-3(b)(1)(B)(i).

*Comment:* Mr. Clifford Duggan submitted the following letter to the board. He stated that the District’s position was supported by Matt Grauer and Bill Goffinant of Indiana Association of Cities and Towns; Lance Hodge of Indiana Solid Waste Management Districts; Steve Christman, the international representative to the Solid Waste Association of North America; Harold Gingrich President of Northeast District and the Association; the Mayor of the City of Gary; and a city councilman from the City of Gary. “This letter will provide an overview of the Lake County Solid Waste Management District's position regarding the proposed changes in 329 IAC 11-9-5, found on pages 6 and 7 of IDEM's Rule Fact sheet, LSA Document #05-297 (SWMB), which changes have the effect of giving the Commissioner the power to make a determination of need for a solid waste facility. We are respectfully requesting that the State Solid Waste Management Board remove the proposed language from the proposed amendment as it relates to 329 IAC 11-9-5, that the Board give full force and effect to the statutory language and legislative intent regarding the County Solid Waste Management District power to make a determination of need for solid waste facilities, and that the Board review this matter further before taking action to modify this section of the Administrative Code. The issue essentially is: Why did the legislature create districts? In reviewing the history of the statutes from the original House Bill 1240, the legislature has viewed Districts as not only the local voice of the people, but as the local voice of the people, but as the local control so necessary in matters which significantly affect the life, health and well-being of the local citizens within the Districts throughout Indiana. Who did the legislature place on the District Boards? Local elected officials. In the case of the Lake County Solid Waste Management District, 27 members: The mayor of every city, a town councilperson from every town, 2 county councilpersons, 1 county commissioner, and additional representatives from municipalities in which final disposal facilities are located, as well as an additional member from the largest municipality in Lake County. In

addition, the legislature gave Districts an extensive list of powers, 27 individual powers at this time, necessary to effectuate that control **under IC 13-21-3-12**. Powers such as:

**(1) The power to develop and implement a district solid waste management plan under IC 13-21-5.**

**(2) The power to impose district fees on the final disposal of solid waste within the district under IC 13-21-13.** .

(3) The power to receive and disburse money, if the primary purpose of activities undertaken under this subdivision is to carry out the provisions of this article.

(4) The power to sue and be sued. .

**(5) The power to plan, design, construct, finance, manage, own, lease, operate, and maintain facilities for solid waste management.**

**(6) The power to enter with any person into a contract or an agreement that is necessary or incidental to the management of solid waste.** Contracts or agreements that may be entered into under this subdivision include those for the following:

(A) The design, construction, operation, financing, ownership, or maintenance of facilities by the district or any other person.

(B) The managing or disposal of solid waste.

(C) The sale or other disposition of materials or products generated by a facility.

Notwithstanding any other statute, the maximum term of a contract or an agreement described in this subdivision may not exceed forty (40) years.

(7) The power to enter into agreements for the leasing of facilities in accordance with IC 36-1-10 or IC 36-9-30.

(8) The power to purchase, lease, or otherwise acquire real or personal property for the management or disposal of solid waste.

(9) The power to sell or lease any facility or part of a facility to any person.

**(10) The power to make and contract for plans, surveys, studies, and investigations necessary for the management or disposal of solid waste.**

(11) The power to enter upon property to make surveys, soundings, borings, and examinations. .

(12) The power to:

(A) accept gifts, grants, loans of money, other property, or services from any source, public or private; and

(B) comply with the terms of the gift, grant, or loan.

**(13) The power to levy a tax** within the district to pay costs of operation in connection with solid waste management, subject to the following:

(A) Regular budget and tax levy procedures.

(B) Section 16 of this chapter.

However, except as provided in sections 15 and 15.5 of this chapter, a property tax rate imposed under this article may not exceed eight and thirty-three hundredths cents (\$0.0833) on each one hundred dollars (\$100) of assessed valuation of property in the district.

(14) The power to borrow in anticipation of taxes.

(15) The power to hire the personnel necessary for the management or disposal of solid waste in accordance with an approved budget and to contract for professional services.

**(16) The power to otherwise do all things necessary for the:**

**(A) reduction, management, and disposal of solid waste; and**

**(B) recovery of waste products from the solid waste stream;**

**if the primary purpose of activities undertaken under this subdivision is to carry out the provisions of this article.**

(17) The power to adopt resolutions that have the force of law. However, a resolution is not effective in a municipality unless the municipality adopts the language of the resolution by ordinance or resolution.

(18) The power to do the following:

(A) Implement a household hazardous waste and conditionally exempt small quantity generator (as described in 40 CFR 261.5(a)) collection and disposal project.

(B) Apply for a household hazardous waste collection and disposal project grant under IC 13-20-20 and carry out all commitments contained in a grant application.

(C) Establish and maintain a program of self-insurance for a household hazardous waste and conditionally exempt small quantity generator (as described in 40 CFR 261.5(a)) collection and disposal project, so that at the end of the district's fiscal year the unused and unencumbered balance of appropriated money reverts to the district's general fund only if the district's board specifically provides by resolution to discontinue the self-insurance fund.

(D) Apply for a household hazardous waste project grant as described in IC 13-20-22-2 and carry out all commitments contained in a grant application.

(19) The power to enter into an interlocal cooperation agreement under IC 36-1-7 to obtain:

(A) fiscal;

(B) administrative;

(C) managerial; or

(D) operational;

services from a county or municipality.

(20) The power to compensate advisory committee members for attending meetings at a rate determined by the board..

(21) The power to reimburse board and advisory committee members for travel and related expenses at a rate determined by the board.

(22) In a joint district, the power to pay a fee from district money to the counties in the district in which a final disposal facility is located.

(23) The power to make grants or loans of:

(A) money;

(B) property; or

(C) services;

to public or private recycling programs, composting programs, or any other programs that reuse any component of the waste stream as a material component.

of another product, if the primary purpose of activities undertaken under this subdivision is to carry out the provisions of this article.

(24) The power to establish by resolution a nonreverting capital fund. A district's board may appropriate money in the fund for:

(A) equipping;

(B) expanding;

(C) modifying; or

(D) remodeling;

an existing facility. Expenditures from a capital fund established under this subdivision must further the goal's and objectives contained in a district's solid waste management plan. Not more than five percent (5%) of the district's total annual budget for the year maybe transferred to the capital fund that year. The balance in the capital fund may not exceed twenty-five percent (25%) of the district's total annual budget If a district's board determines by resolution that a part of a capital fund will not be needed to further the goals and objectives contained in the district's solid waste management plan, that part of the capital fund may be transferred to the district's general fund, to be used to offset tipping fees, property tax revenues, or both tipping fees and property tax revenues.

(25) The power to conduct promotional or educational programs that include giving awards and incentives that further the district's solid waste management plan.

(26) The power to conduct educational programs under IC 13-20-17.5 to provide information to the public concerning:

(A) the reuse and recycling of mercury in:

(i) mercury commodities; and

(ii) mercury-added products; and

(B) collection programs available to the public for:

(i) mercury commodities; and

(ii) mercury-added products.

(27) The power to implement mercury collection programs under IC 13-20-17. 5 for the public and small businesses.

Under section 16, it even gave the Districts a "necessary and proper" clause: Districts have the power to do all things necessary for proper solid waste management within the District.

The Indiana Courts have also recognized the powers and responsibilities of the Districts, and have followed the word and intent of the legislature in ratifying those. powers: in the, Worman decision, (*Worman Enterprises v. Boone County Solid Waste Management District*, 805 N.E.2d 369 (Ind. 2004)), where the Indiana Supreme Court recognized the District's specific authority granted by statute to regulate solid waste, and where the Court called for the Districts to collaborate with IDEM. and IDEM to collaborate with Districts, to deal with solid waste issues. The Court cited as an example of that collaboration the section of the code in which Districts adopt, and submit to the IDEM

Commissioner for approval, the District's Solid Waste Management Plan. The Indiana Court of Appeals recognized the higher calling of the Districts in the LaPorte decision, (*Board of Commissioners of LaPorte County v. Town and Country Utilities*, 791 NE 2d 249 (2003)), where the Appellate Court stated that it was clear that county solid waste management districts are an integral part of the overall state system for addressing, among other things, solid waste management and disposal. An integral part. The Appellate Court went on to say that the districts are charged with assessing the needs of their respective districts and there is nothing that conflicts with the permitting function of IDEM, in the District determining if there is a need for a facility in a district. IDEM and Districts are not adversarial, and neither are they mutually exclusive. They are to work together, each having their place in effective solid waste management in the state.

Districts are required, as their first and continuing order of business, to create, and whenever necessary, to amend their Solid Waste Plans. Included in those plans are the current conditions of the Districts, and 5, 10 and 20 year projections of what should be. The legislature created a detailed procedure to establish the framework for District plans at the state level, to establish some continuity, but allowed the individual Districts to provide the substance of each district's plan to be responsive to each district's situation, and to address each district's needs. It was the first requirement of the Districts. And the statute originally forced Districts to amend their plans every five years, but in recognizing the dynamics of solid waste, the statute was amended to have Districts amend their plans **whenever** needs changed.

The key word is Need. Determination of Need. In the statutory and administrative codes, the permit process for solid waste facilities and solid waste landfills again is detailed, outlining requirements which must be met. Is IDEM the ultimate permit authority? - Absolutely.

Do Districts have permit authority? Not permit authority in conflict with the state permit authority, unless provided for by statute. But after all the authority granted to Districts, and all the emphasis and detail required in their District plans, and amendment of those plans, and implementation of District projects and programs, are they excluded from any meaningful input in the entire process?

I give the legislature more credit than that. I give the State Solid Waste Board more credit than that. And I give the Courts more credit than that. The legislature, and the State Solid Waste Board, have provided an area of expertise to the Districts: need. Who better to determine whether solid waste services are being adequately provided on the local or regional basis than the Districts, whose day to day existence is dedicated to insuring that local solid waste management needs are being effectively met, not only on a daily level, and yearly level, but on a 5, 10 and 20 year level. And who is on the Board, but local elected officials, whose responsibilities require that they remain up to date on local issues, receive local input on a regular basis, and have local information readily accessible? And what better checks and balances is there than to have IDEM review and approve those District plans, and any amendments thereto. IDEM and the Districts, working together for the common good.

The statutes in question are:

Indiana Code 13 - 20-1- 2 which states that an applicant for a permit for a solid waste management

facility "must demonstrate that there is a local or regional need in Indiana for the facility". Indiana Code 13- 20-1- 3, which states that the applicant "must" submit with its application "a description of the need that would be fulfilled by constructing the solid waste management facility". And Indiana Code 13-15-1-3, which states that it is the State Solid Waste Management Board which establishes requirements for the issuance of permits.

The administrative code in question is:

329 Indiana Administrative Code 11-9-5, which currently **requires** the following as part of an applicants submission: (b)(3): A description of the need that would be fulfilled by constructing the facility as follows: (A) for facilities with approved district solid waste management plans, a description of the need identified in the district solid waste management plan required under Indiana Code 13-21-5. Under © of Indiana Administrative Code 11-9-5, the code states: The commissioner shall review the submitted application and accompanying materials in accordance with this rule (329 IAC 11-9). If it is determined that there is not a local or regional need in Indiana for the solid waste management facility, the commissioner shall deny the permit application.

Since this section of the administrative code refers to Indiana Code 13-21-5 with regards to the District plan, we need to refer back to that portion of the Indiana Code. It states that a district must include, as part of its plan, "a projection of the need for; and description of; facilities in the district 5, 10, and 20 years after the year the district plan is adopted". An important fact to note is that there is no requirement for Districts to make negative findings: in other words, Districts are not required to find that there is no need for this or that type of solid waste facility. While Districts are not precluded from making such a finding, they are not required to do so.

Indiana Code 13-21-5-12 further requires that a District plan establish a solid waste management policy for the District that reflects the needs of the district and provides an integrated approach to solid waste management that. includes (a) source reduction, (b) alternatives to complete or partial dependence on final disposal facilities, and (c) final disposal facilities.

How to interpret it all? The legislature recognized IDEM's expertise in numerous areas and allowed it to operate within those parameters. IDEM has the extensive responsibility to protect the environment for the health, safety and welfare of the citizens of Indiana. But the legislature also recognized IDEM's limitations in its permit review process, and that IDEM couldn't, and shouldn't, do it alone. IDEM itself has readily acknowledged its limitations in terms of its funding, its workforce, and its ability to meet the expansive scope of review necessary to insure that protection. The legislature has also recognize the District's value, in being in the best position to determine what actually is needed on the local and regional level. So, while the legislature gave IDEM the gun, and gave it authority to review a multitude of factors for which it has expertise, the legislature gave the Districts a silver bullet---determination of need. While IDEM still pulls the trigger on permits, if there is no need found by the District for a facility, IDEM must fire the silver bullet, and the permit fails.

Is there a danger Districts may make arbitrary and capricious decisions? They're no different in that regard to any other governmental entity. And there is judicial review for protection in those



circumstances, which can be dealt with on a case by case basis. But there is a system in place which must be followed. A system which provides an integrated approach, incorporating the strengths of state review in IDEM, and the strengths of local determination of need by Districts. Give the legislature credit. They created the system. Give the Courts credit. The Indiana Supreme Court and Indiana Court of Appeals have already recognized and validated the system. We are respectfully asking the State Solid Waste Management Board to affirm the system, and to promulgate rules which uphold and are consistent with the system.

The Lake County Solid Waste Management District is currently involved in litigation with IDEM regarding just this issue and this section of the Administrative Code in the case entitled *Indiana Department of Environmental Management and Midwest Medical Solutions, LLC v. Lake County Solid Waste Management District*, 45A04-0507-CV-398. The Trial Court in that case voided IDEM's approval of an infectious waste processing facility, finding its approval arbitrary and capricious, and contrary to the application of the statutes and administrative code as outlined in this letter. The Court of Appeals reversed, interpreting the administrative code contrary to the position outlined herein. A Petition for Transfer to the Indiana Supreme Court will be filed shortly by the District. Hopefully, the matter will be appropriately resolved thereafter.

We therefore respectfully request that the Board remove the proposed language from the proposed amendment as it relates to 329 IAC 11-9-5, and that the Board review this issue further to promulgate such rules as are consistent with the legislative language and intent, and with the position described in this letter.” (LCSWMD)

*Comment:* “This letter is to respectfully submit the City of Gary's opposition to the proposed amendment to 329 Indiana Administrative Code 11-9 which would remove the effectiveness of a County Solid Waste Management District's power to exert their authority in its determination of need for solid waste facilities. The state legislature delegated such a responsibility to the Districts, recognizing that local County Solid Waste Districts were in the best position to make such a determination.

The City of Gary is in full support of the Lake County Solid Waste Management District's efforts regarding the District's opposition to the proposed amendment as currently proposed, and regarding the District's support of language which would fulfill the legislative intent of the Indiana statutes involving County Solid Waste Management Districts.” (MRC)

*Comment:* “I am forwarding to this Board, a copy of the resolution sponsored by the Gary Common Council. The resolution will be presented at our next meeting, Tuesday, September 19, 2006 and is expected to pass unanimously as it is consistent with past positions of this body and reflects today's sentiment in relation to the matter you are considering.

City of Gary

PENDING RESOLUTION 06-11  
RESOLUTION NO.

AS AMENDED  
CERTIFICATION DATE  
CERTIFIED B  
FAVORABLY  
UNFAVORABLY

A RESOLUTION SUPPORTING THE COUNTY SOLID WASTE MANAGEMENT  
DISTRICTS' DETERMINATION OF NEED

WHEREAS, the Lake County Solid Waste Management District, as well as all other County Solid Waste Management Districts throughout the State of Indiana, hereinafter "Districts", have the powers, duties and responsibilities outlined in the Indiana Code and case law; and

WHEREAS, among those powers, duties and responsibilities is the continuing responsibility to determine the need for solid waste facilities; and

WHEREAS, it is in the best interests of the citizens of the State of Indiana that the Districts have such power, duty and responsibility to make a determination of need for solid waste facilities in order to provide for the proper management of solid waste within the Districts and the State of Indiana.

NOW, THEREFORE BE IT RESOLVED by the Common Council of the City of GARY that we support the Lake County Solid Waste Management District's opposition to any amendment to the Indiana Administrative Code which would alter or inhibit such power of the Districts to make and enforce their determination of need for solid waste facilities, which amendment would thus be contrary to the Indiana statutes and legislative intent thereof.

BE IT FURTHER RESOLVED that the Gary Common Council supports the Lake County Solid Waste Management District's support of any amendment to the Indiana Administrative Code which would recognize, enforce and give full effect to the power of Districts to make determinations of need for solid waste facilities. as intended and promulgated by the Indiana State legislature.

RESOLVED AND ADOPTED by the Common Council of the City of Gary, Indiana  
this \_\_\_\_ day of \_\_\_\_\_, 2006

ROY PRATT, President  
Gary Common Council

ATTEST:

SUZETTE RAGGS. CITY CLERK

Presented by me to the Mayor for his approval and signature this \_\_\_\_ day of \_\_\_\_, 2006

SUZETTE RAGGS, City Clerk

Approved and signed by me this \_\_\_\_ day of \_\_\_\_, 2006"

(COG)

*Response:* The changes IDEM is proposing in 329 IAC 11-9-5 reflect the existing statutory authority of IDEM in reference to solid waste processing permits issued by IDEM. IDEM's position on amending 329 IAC 11-9-5 has been, and is, absolutely consistent with the decision of the Indiana Court of Appeals in the *Midwest Medical* case, as the commenter has stated.

The purpose of 329 IAC 11-9-5 is to inform the permit applicant about what information demonstrating need is to be provided to IDEM. 329 IAC 11-9-5(c) currently states that the commissioner reviews the permit application and accompanying materials "in accordance with this rule". The amendments clarify that the review allows the commissioner to make an informed determination of need for a particular facility [or major facility modification]. This determination must be made as part of the process of IDEM issuing a solid waste processing permit.

IDEM reiterates that the amendments to this section would not take away any authority that the solid waste districts have under Indiana statutes. These amendments are instead designed to clarify that the commissioner must be provided the findings of the solid waste district on the need for a particular facility, if such findings exist, or the applicant must seek out and provide information concerning the need for a particular facility.

## **SUMMARY/RESPONSE TO COMMENTS FROM THE CONTINUED FIRST HEARING ON NOVEMBER 21, 2006**

IDEM received comments from the following parties:

Association of Indiana Solid Waste Management Districts, Inc. (AISWMD)  
Lake County Solid Waste Management District (LCSWMD)(Clifford Duggan)  
Northeast Solid Waste District (NESWD)  
Association of Indiana Counties (AIC)  
Lake County Solid Waste Management District (LCSWMD)(Jeff Langbehn)

Following is a summary of the comments received and IDEM's responses thereto. The comments belong to the following category:

*Comment:* "My name is Lance Hodge, and I represent the Association of Indiana Solid

Waste Management Districts, Inc., which is the 501(c)(6) nonprofit trade organization for solid waste management districts in Indiana. It represents over ninety percent of the solid waste management districts in Indiana. Subsequent to your last meeting, Mr. Duggan, from the Lake County Solid Waste Management District, appeared before my board of directors to give his interpretation of the statute regarding the determination of need, and the opinion that the determination of need lies with the local elected officials that sit on the solid waste management district boards. As Mr. Palin indicated, that is opposite of their interpretation at this time. The Board of Directors of the Association has voted to approve Mr. Duggan's interpretation that the local solid waste management district boards should be the bodies that, within their plans, make the determination of need for a facility, and that then the determination need being put in their solid waste management district plan is then approved or denied by IDEM, based on the facts that are in the plan. Also the Board supports the contention that by omitting a certain solid waste processing facility activity from a plan, that is an active omission, which would indicate that there is no need for such a facility within the borders of a solid waste management district. The Board has sent me to testify here today basically to ensure that no language is changed in the rule that would decrease the authority of the local elected officials on the solid waste management district boards for the determination of need as it relates to issuing of solid waste facility permits by IDEM.” (AISWMD)

*Comment:* Mr. Clifford Duggan commented on the rule: “I appreciate the opportunity to be in front of you again today. And I apologize for that, in part. As I think was brought up at the beginning, I thought the initial intent of the Board was to table this so that there could be agreeable language reached, and in fact I did go up to the Commissioner and Bruce after the meeting to try to reach--or to set up a meeting. But it was--while we still are ready, willing, and able to sit down and try to reach some mutually agreeable language, it has been IDEM's position to sit pat, or stand pat, and leave the language as is. Now the proposed language in the document as currently proposed, other than Section 13, which I believe is on page 6 of the packet, reflects legislative language changes which support the rest of those proposals. The language as currently proposed in Section 13, which deals with 329 IAC 11-9-5, does not--in fact the proposed change that is in Section 13 changes the statutory power and the legislative intent regarding districts. If IDEM wants to change the districts' powers, the statutory process, or the legislative intent, then the proper place to do that would be in the Legislature; and then, like they have done with the other changes in the proposed language of this document, they can propose the change in the Administrative Code that's consistent with the statutory language change. I previously had provided to this Board a detailed analysis of the statutes, Administrative Code, and the case law involving this issue. Included in that multipage document was the statute that was cited by Bruce, but in addition also contained all of the other relevant statutes, Administrative Code, and case law that involves this particular issue. I have extra copies of that document if any of the Board members wish to re-review it. I also have a copy of the District resolution which

establishes factors that the District considers in its determination of need. And it was drafted after review of other States' statutes outlining determination of need, and it establishes an extensive list of criteria which the District Board considers in its determination. And I have additional copies for Board members to re-review as well. Simply put, IDEM has the responsibility to permit facilities. Determination of need is one of those factors that it must consider in issuing the permit. Districts have the responsibility to make that determination of need for solid waste facilities. The local control through that determination of need by local elected officials is what's established by statute and what's intended by the Legislature, and is, quite frankly, the best and proper procedure to follow. The position that I presented today is supported by the Indiana Association of Cities and Towns, the Indiana--or the Association of Indiana Counties, and as Lance said, also by the Association of Solid Waste Districts. To respond in part to Bruce's comment with the litigation: Absolutely correct, we did--as a district did pretty well at the trial court level, with a hundred-and some-point decision in our favor. Unfortunately, the Court of Appeals then went their way. It is petitioned for transfer to the Supreme Court, where the issue will be ultimately resolved. I encourage you as a board to, if you wish to approve all other proposed language in that document--as I say, we support all of those changes--we would respectfully request that you do not include Section 13's proposed language as part of your approval, and that you again direct both IDEM and the districts to sit down and enter into meaningful discussions, clarifying this issue."

Mr. Duggan also explained that the much of his presentation points to the decision that the court is making. The court is looking at the statutes, the Administrative code, and case law, interpreting as they are construed together, as to whether the districts or the commissioner have the power of determination of need. (LCSWMD)

*Comment:* "My name is Steve Christman, I'm the Executive Director of the Northeast Indiana Solid Waste Management District. The Northeast District was the second district formed in the state, in 1990, and the first multi--or joint multicounty district formed in the state. We have a long history of getting rid of solid waste management, and a long history of dealing with existing and proposed facilities, if you will. The Board of the Northeast District has asked me to stand in opposition to this current administrative rule. We have great concern over the demonstration of need language. A lot of the technologies that are proposed are new technologies that are coming into our districts. And we would submit the argument that, as the ensuing years go by, we are going to have more and more proposed facilities through economic development efforts and resource reduction, and we are going to need clear language at the local level in order to deal with those. For example, back in the early nineties we had proposed vinyl disposal facilities. We sent letters of opposition to those to IDEM on behalf of the Board. And in those particular cases those permit applications were withdrawn. Currently today, fifteen years later, I've got two potential facilities that are being proposed before this local board. My local

Board of Directors are telling me, "Do you mean to tell me that, no matter what we do, it's in IDEM's hands?" And they're not And I say, "Yes." real comfortable with that, as their constituents would prefer to deal with that local board when it comes to those integrated solid waste management decisions. We've discussed a lot of making modifications at the zoning phase; that's been a suggestion. Most of our plan commissions and their attorneys have made it very clear that their mission is to address the land use planning aspect of that, and not the solid waste aspect of it. They would expect the local solid waste board to deal with those proposed facilities just as the local solid waste board deals with its solid waste planning program. So we have grave concern, because we know people with two proposed facilities today, that there will be more in the future, hopefully as we build our local economies better, and we need more clear language. I think the technologies that are addressed are a clear example of what we are currently dealing with I'm not convinced it's not comprehensive enough. We have some trend-setting composting going on, and I know IDEM's really struggled, they haven't had the regulation to deal with those types of things. I think we can address that a little bit better. So I would, on behalf of the Board of Northeast District, stand in opposition at least to the language in this current administrative rule as it's presented." (NESWD)

*Comment:* Mr. David Bortoff commented on the rule: "Appreciate the opportunity to speak to you I'll try not to repeat some of the previous today. testimony, but as Executive Director of the Association of Indiana Counties, representing the ninety-two counties. Included in our membership are the County Councils and County Commissioners, and all their elected county offices. We are, as previously stated, concerned that the IDEM Commissioner would make the final determination on the need for a regional facility and not the local elected officials who serve on solid waste district boards. We believe that those local elected officials are best suited to make the determination of the real need. We believe, in essence, that's somewhat why the boards were created in the first place, to put local elected officials on there, and so that they could have input and know the needs of the local community; they know the wants and desires of the local citizenry. So therefore we believe that it should be determined by the Board, and not by the Commissioner. Clearly, the current rule is somewhat ambiguous when it says, "if it is determined that there is a local need", we thought you could just as easily put in there, "if the Solid Waste District Management Board determines that there is a local need". And referring to Section 13, paragraph C. Again, just in conclusion, and to kind of repeat what has been said earlier, our members, the local elected officials of the county, would rather see this determination made by the Solid Waste Management District Board, and give a final determination, and not by the State agency." (AIC)

*Comment:* Mr. Jeff Langbehn commented on the rule: "I'm appearing before you to express what I think is a genuine dispute that we have. I have the utmost respect for the Commissioner and Bruce, I also sit as the Executive Director of the largest solid waste district in

the state. I have twenty-seven elected officials, from both parties, and they unanimously support the position that the local elected officials need to be in a position to make the determination of need, and fully supporting the position that IDEM fits in and passes judgment as to whether a permit is issued. This is a dispute that, quite frankly, I don't believe belongs before this board, I think you are placed in an untenable position, to try to make a legislative decision, and would respectfully ask that, on this particular clause of need, that you remand it back to the Legislature and let them make it, because it's going to come down to a legislative need, witness the fact that we, as Bruce and Cliff have said before me, we have two conflicting decisions of two different courts, and it's now going before the Supreme. I just think that it is in a position of genuine dispute which we have. Both arguments have credible arguments, on both sides. The reality of it is, is the local elected officials are adamant that they need to be part of the decision-making process. And I think that this portion of the decision needs to be left to the Legislature, who created not only solid waste districts but this board in fact. And I would ask that you continue to suspend this portion of the rules to allow the Legislature and/or the courts, or both, to fulfill their obligation to make a final decision.” (LCSWMD)

*Response:* The changes IDEM is proposing in 329 IAC 11-9-5 reflect the existing statutory authority of IDEM in reference to solid waste processing permits issued by IDEM. IDEM’s position on amending 329 IAC 11-9-5 has been, and is, absolutely consistent with the decision of the Indiana Court of Appeals in the *Midwest Medical* case, as the commenter has stated.

The purpose of 329 IAC 11-9-5 is to inform the permit applicant about what information demonstrating need is to be provided to IDEM. 329 IAC 11-9-5(c) currently states that the commissioner reviews the permit application and accompanying materials “in accordance with this rule”. The amendments clarify that the review allows the commissioner to make an informed determination of need for a particular facility [or major facility modification]. This determination must be made as part of the process of IDEM issuing a solid waste processing permit.

IDEM reiterates that the amendments to this section would not take away any authority that the solid waste districts have under Indiana statutes. These amendments are instead designed to clarify that the commissioner must be provided the findings of the solid waste district on the need for a particular facility, if such findings exist, or the applicant must seek out and provide information concerning the need for a particular facility.